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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 359

EUNICE RICE MILLING COMPANY,

Petitioner,

versus

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY,

Respondent.

APPLICATION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

GROVE STAFFORD,
Attorney for Petitioner,
710 Guaranty Bank Bldg.,
Alexandria, Louisiana.

Ledoux R. Provosty,
Alexandria, La.
Stafford & Pitts,
Alexandria, La.

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To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of the United States:

The petition of EUNICE RICE MILLING COMPANY for certiorari to the United States Court of Appeals for the Fifth Circuit with respect shows:

MATTERS INVOLVED.

The Eunice Rice Milling Company, a resident of Louisiana, entered into a written contract with one William H. LaDew, a resident of Texas, under which the latter agreed to build and install a sprinkler system in the former's rice mill at Eunice, Louisiana. The contract was entered into in Louisiana from LaDew's office in Hammond, La.

After the sprinkler system was installed, the mill caught fire and the sprinkler system failed to function, with the result that the mill burned.

The mill owners contended that the loss was due to the negligence of LaDew, and brought suit in a District Court of the United States in Louisiana against his liability insurance carrier, which is the respondent herein. Judgment was entered on a jury verdict for approximately $14,000.00, and the defendant insurance company appealed to the Court of Appeals for the Fifth Circuit.

The Court of Appeals, by a divided court, reversed and dismissed the suit, holding that Louisiana's direct action statute had no effect as to a liability policy written in the state of Texas. The liability policy involved, although written at LaDew's home in Texas, was specially endorsed so as to cover only his operations in the state of Louisiana.

Louisiana has a statute giving an injured person a right of direct action against insurance companies on liability policies. It is petitioner's contention that since the policy covered only liability arising out of operations in Louisiana, the insurance contract was in effect to be performed in Louisiana, and that the law of the place of performance governs as to matters relating to execution of the contract.

BASIS OF JURISDICTION.

This Court, in its discretion, is authorized to review cases in the courts of appeal by *U. S. C. A., Title 28, Section 1254.*

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QUESTION PRESENTED.

The insurance policy involved in this suit was written and delivered in Texas, where LaDew resided. It contains the following special endorsement:

> "It is agreed that the insurance afforded by this policy applies only to operations performed in the State of Louisiana."

The policy contains what is commonly referred to as the "No Action Clause". The state of Louisiana has a statute permitting a direct action on a liability policy as to causes of action arising in Louisiana.

In this case LaDew, a resident of Texas, was not amenable to process in Louisiana, and the suit was brought directly against his liability insurer.

The question is thus presented as to whether the law of Louisiana or the law of Texas governs in a suit on the policy on a cause of action arising in Louisiana.

In other words, where the policy covers only liability arising in Louisiana, and not elsewhere, will the Louisiana act be given effect, or would this be in violation of the obligation of contract?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner contends that a writ should be granted because the Court of Appeals for the Fifth Circuit has decided the question presented, involving a Louisiana statute, in direct conflict with the highest Louisiana state courts; and for the further reason that the Court of Appeals' holding is in conflict with a long line of decisions of

this Court to the effect that matters connected with the execution of a contract are regulated by the law of the place where the contract by its terms is to be performed.

Petitioner files herewith a certified copy of the record in the case, including the proceedings in the Court of Appeals, together with stipulation of counsel as to portions of such record to be printed for consideration of this Court.

Petitioner files herewith its brief in support of this application.

WHEREFORE, petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, in the suit entitled "Employers Mutual Liability Insurance Company v. Eunice Rice Milling Company", No. 13,907 on the docket of said court, to the end that the judgment of such court may be reversed and the case be remanded to such court for further consideration on the merits.

EUNICE RICE MILLING COMPANY,

By GROVE STAFFORD,
Attorney for Petitioner,
710 Guaranty Bank Bldg.,
Alexandria, Louisiana.

Ledoux R. Provosty,
Alexandria, La.
Stafford & Pitts,
Alexandria, La.

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BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

The case has been stated in the petition for certiorari.

In reversing the District Court of the United States for the Western District of Louisiana, the Court of Appeals held that the insurance policy sued upon, written in Texas, could not be affected by the direct action statute of the state of Louisiana, even though the policy was to be effective as to Louisiana operations only. The court stated that there was no substantial difference between this case and *Fisher v. Home Indemnity Company, No. 13,810* on its docket, and decided the same day.

In the *Fisher* case, the court adopted the views expressed by the district judge in *Belanger v. Great American Indemnity Company, 89 Fed. Supp. 736,* to the general effect that the direct action statute of Louisiana is ineffective as to policies written outside of Louisiana.

The *Fisher* case and the *Belanger* case are in direct conflict with the cases decided by the Louisiana appellate courts, the latest of which is *Churchman v. Ingram, 56 So. (2d) 297.*

Ignoring, for the purpose of this argument, the conflict between cases decided by our state courts and the Court of Appeals, however, it is pointed out to Your Honors that the instant case involves a broad and substantial difference between the ordinary case where the question is simply whether the Louisiana statute can affect an out of the state policy.

The principle for which we contend here is that where a policy is written in one state, but to be effective only in another state, the law of the place of performance governs as to matters of execution and performance. This principle is recognized by Judge Russell's dissent in the instant case, wherein it was stated:

> "In writing the policy now involved and restricting its coverage only to operations performed in the State of Louisiana, the insurer must be held to have contracted with a view to subjection to the provisions of Louisiana law. Having done so, it is not in position to successfully maintain that the statutes and jurisprudence of that State unconstitutionally seek to impinge upon its contractual rights."

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The clearest statements of the principle of conflict of laws which we invoke here come from this Court. In *London Assurance v. Companhia de Moagens Do Barriero, 167 U. S. 149, 42 L. Ed. 120,* Mr. Justice Peckham stated:

> "Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, Sec. 280, says: 'But where the contract is, either expressly or tacitly, to be performed in any other place then the general rule is in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem a result of natural justice.' The rule was fully recognized and acted on in a recent case by the Supreme Court of the United States, where the court said that the general principle, in relation to contracts made in one place to be executed in another, was well settled; that they are to be governed by the law of the place of performance."

In *Oceanic Steam Nav. Co. v. Corcoran, 9 Fed. (2d) 724,* the Court said:

> "* * * There are cases in which the Supreme Court of the United States has laid down that when the contract is to be performed in a place other than the place where it is made, the law of the place of performance governs the validity, nature, obligation and effect rather than the law of the place where it

is made. London Assurance Company v. Companhia de Moagens Do Barriero, 167 U. S. 149, 161, 17 S. Ct. 785, 42 L. Ed. 113. And in Andrews v. Pond, 13 Pt. 65, 10 L. Ed. 61, Chief Justice Taney writing for the court, said: 'The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance'."

"Chief Justice Marshall, in 1925, in Wayman v. Southard, 10 Wheat 1. 48 (6 L. Ed.) 253, stated it as a principle of universal law 'that in every forum a contract is governed by the law with a view to which it was made'. And in 1760 Lord Mansfield in Robinson v. Bland, supra, said: 'The law of the place can never be the rule where the transaction is entered into with an express view of the law of another country, as the rule by which it is to be governed.' In Pritchard v. Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104, the question was elaborately considered as to the law to be applied to a written obligation executed in New York which was performed in Louisiana. It was held that the validity of the contract was dependent, not upon the law of New York, but upon that of Louisiana, as the lex loci solutionis."

American Jurisprudence, Vol. 11, p. 403, states the rule:

"The Supreme Court of the United States has laid down the following rules in reference to the law governing contracts in cases in which the place of making and the place of performance are not the

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same: (1) matters bearing upon the execution, interpretation and validity are determined by the law of the place where the contract is made; (2) **matters connected with the performance are regulated by the law of the place where the contract by its terms is to be performed;** and (3) matters relating to procedure depend upon the law of the forum. These three general rules have been adopted and applied by many jurisdictions in a long list of cases involving almost every conceivable kind of contract."

"In many cases, however, it is even more generally stated where the contract is to be performed in a place other than the place where it is made that the law of the place where the contract is to be performed will determine the validity, nature, obligation, and effect of the contract, or, in other words, in case of conflict of the lex loci solutionis will prevail over the lex loci contractus."

Corpus Juris Secundum, Vol. 15, p. 886, verbo Conflict of Laws, states:

"In many cases the law of the place of performance is held to govern where performance is to be at a place other than the place of making. A contrary intention of the parties prevails, according to many other cases. Matters relating to performance are generally held to be governed by the law of the place of performance."

"It has been broadly stated in a number of cases that the general rule governing the validity and

construction of a contract and the rights and liabilities thereunder, is that the law of the place of performance, the lex loci solutionis, applies, which place, it has also been said is presumed to be the place where the contract was made if a contrary showing is not made.

"More frequently, however, it is given as the general rule that when a contract is to be performed at a place other than where it was made, the place of performance or execution will govern with respect to the nature, validity, and construction of the contract. This rule is frequently based on the presumption that the parties to a contract are presumed to contract with reference to the law of the place where the contract is to be performed * * *."

Couch's Cyclopedia of Insurance Law, Vol. 1, p. 435, states:

"Some courts hold that, as a general rule, the rights of the parties to a contract of insurance are governed by the laws of the place where the contract is to be performed, and not by the laws of the place where made, since it will be presumed that the contract was entered into with reference to such laws." Citing *Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed 245; Thompson v. Traders Insurance Company, 169 Mo. 12, 68 S. W. 889; Progresso S. S. Co. v. St. Paul Fire & Marine Insurance Co., 146 Cal. 279, 79 Pac. 967; Booz v. Booz, 183 Iowa 381, 167 N. W. 93; Hyde v. Goodnow, 3 N. Y. 266; McGowin v. Menken, 177 App. Div. 841, 164 N. Y. S. 953.*

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In the instant case, we say that the contract of insurance was to be performed in Louisiana. What constitutes performance of a liability insurance contract? Performance consists of the investigation and settlement of claims arising against the assured. As to the policy in question all this had to be done in Louisiana, because the policy covered only LaDew's Louisiana operations.

In connection with the claim sued on here the insurance company investigated the loss in Louisiana and carried on extended negotiations with the plaintiffs in Louisiana through its office in New Orleans. It performed this much of its contract here, but when a settlement could not be agreed upon the defendant insurance company took the position that it could be sued only in Texas, where there was simply a manual delivery of the policy.

In this case the defendant insurance company was sued simply because the assured, LaDew, operates as an individual, resides in the state of Texas, and is not amenable to the jurisdiction of Louisiana state or federal courts. The only alternative would be to go to Texas, take all the witnesses from Louisiana and prove the Louisiana law. The Louisiana direct action statute was designed to prevent such an incongruous situation, and we think that when the insurance company placed the special endorsement on its policy it contracted with reference to the Louisiana laws relating to performance.

In view of the ever broadening field of liability insurance the question raised here is one of considerable im-

portance in construing insurance contracts in the light of constitutional provisions. It is respectfully submitted that the decision of the Court of Appeals is wrong and that the writ sought herein should be granted.

GROVE STAFFORD,
Attorney for Petitioner.

Ledoux R. Provosty,
Alexandria, La.
Stafford & Pitts,
Alexandria, La.

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